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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

NOV 11 2014

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File: SRC 02 270 52635 Office: TEXAS SERVICE CENTER Date: OCT 01 2014

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida, and is engaged in the business of property management. The U.S. petitioner claims that it is the subsidiary of Mas Vida & Salud, C.A., located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been and would continue to be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and that the beneficiary was in fact acting in an executive and managerial capacity during the previous year. In support of this assertion, the petitioner submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, counsel for the petitioner alleged that the beneficiary has been employed by the U.S. entity in a primarily executive capacity. Specifically, counsel stated that "[the beneficiary] directs and manages the employees and the business. He makes all day to day decisions for the company's direction and expansions, as needed. He has the capacity to hire and fire employees." The petitioner provided an organization chart showing the beneficiary acting as President, Richart Amaro as Vice President, and positions reserved for sales persons that had yet to be filled.

On November 11, 2002, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Specifically, the director requested:

- (1) The number of persons currently employed by the U.S. entity and their titles;
- (2) Clarification regarding the petitioner's claim that it employed one person and one subcontractor, since this claim contradicted the organizational chart submitted with the petition; and
- (3) The number of contract workers contracted to work on behalf of the U.S. entity and their titles.

In addition, the director requested that the petitioner provide its current gross annual income.

In a response dated January 31, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response included a copy of the U.S. entity's 2002 Form 1040, U.S. Federal Tax Return, which demonstrated a gross annual income of \$44,773.00. In addition, counsel for the petitioner explained that the U.S. entity now employed four employees, including the beneficiary, and described their positions as president/CEO, sales person, reservations, and service

technician. Counsel further advised that the U.S. entity had contracted one additional person to serve as a broker. Finally, counsel explained that the claim that the petitioner employed a vice-president, as set forth on the organizational chart, was only a potential position that might be filled in the future should the extension request be granted.

On March 18, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be acting in a capacity that was primarily managerial or executive, and based her decision on the fact that the 2002 tax return did not evidence the employment of any employees aside from the beneficiary. Specifically, the director noted that the tax return listed a total of \$35,000.00 paid in salaries in the year 2002, notably the exact amount of the beneficiary's salary as set forth on page 2 of the Form I-129 which accompanied the initial petition.

On appeal, counsel for the petitioner asserts that the director's decision was erroneously based solely on the 2002 tax return, and not upon a true examination of the beneficiary's actual duties. Counsel contends that the nature of the beneficiary's daily activities clearly satisfies the regulatory requirements that he be working in a primarily managerial or executive capacity.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel presents two main arguments in support of a finding in the petitioner's favor. First, counsel alleges that the beneficiary qualifies as a manager or executive because he performs a combination of all the duties listed in the regulatory definitions. Second, counsel asserts that the director's reliance on the 2002 tax return, showing only the employment of the beneficiary and the payment of wages solely to him during that period, was erroneous, because it is undisputed that the additional employees were hired *after* 2002. Counsel alleges that the director should have examined the subsequent employment of these persons in the year 2003 as evidence that the beneficiary worked primarily in a supervisory capacity. Finally, counsel alleges that an undue hardship would result to the petitioner should the extension request be denied. The AAO will address all of these assertions individually.

The first issue to examine is whether the beneficiary's duties qualify him as a manager or executive under the regulatory requirements. Prior to adjudication of the petition, counsel contended that the beneficiary had been employed in a capacity that was primarily executive in nature. In support of this contention, counsel submitted a description of the beneficiary's duties that essentially paraphrased the regulatory definition of the term "managerial capacity." Specifically, counsel alleged that the beneficiary managed the employees of the U.S. entity and the business itself, had the authority to hire and fire employees, and made all of the day-to-day decision in for the U.S. entity. Counsel provided no further explanation or detail with regard to the

beneficiary's day-to-day activities. Instead, counsel merely concluded that the beneficiary was acting in a capacity that is primarily executive, based on this brief statement of duties and the fact that the Articles of Incorporation clearly name the beneficiary as the president of the U.S. entity. These contentions, however, are insufficient to warrant a conclusion that the beneficiary has satisfied the regulatory requirements. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Regardless of the brevity of the beneficiary's statement of duties, the AAO must look to the description of these job duties when examining the executive or managerial capacity of the beneficiary. See 8 C.F.R. § 214.2(l)(3)(ii). In this case, counsel emphasized the beneficiary's "direction" of employees and his authority to "hire and fire" employees. On appeal, counsel further alleged that:

Often, a person performs a combination of duties so that job definitions become mixed. Managers and executives regularly apply their professional expertise and specialized knowledge of the employer's business procedures to a particular problem. This is especially true of start-up operations and other small enterprises. Trying to categorize such people as belonging exclusively to the managerial, executive, or specialized knowledge categories will not reflect the realities of the business environment for the company.

Counsel provided this statement in support of a finding that the beneficiary, acting in a start-up capacity, has performed multiple tasks during the previous year, and thus, with a combination of all of these duties, has satisfied the regulatory requirements. This assertion is ill founded and erroneous. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive under section 101(a)(44)(B) of the Act and the statutory definition for manager under 101(a)(44)(A) of the Act, if it is representing the beneficiary is both an executive and a manager. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

Second, counsel asserts that the director's reliance on the one salary evidenced on the 2002 tax return was erroneous, because in doing so, she failed to regard the future employment of the additional employees after the filing of the 2002 return, and their subsequent supervision by the beneficiary. Specifically, counsel asserted that the director should have thoroughly considered the statement regarding the additional employees and contractor submitted by counsel in response to the director's request for additional evidence. This statement regarding the current employees of the U.S. entity, however, was not supported by corroborating evidence, such as pay stubs or W-2 forms. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The director, consequently, did not err by disregarding this documentation as evidence of the beneficiary's supervisory obligations and thus his managerial or executive position. Notably, this statement regarding the additional employees was submitted in January of 2003, several months after the expiration of the initial one-year stay granted to the beneficiary.¹ The statement claimed that the petitioner "currently" employed four employees and one contract employee, but provided no evidence that these employees were hired and working for the U.S. entity in the year immediately following the granting of the initial petition. To establish that the petitioner has staffed the new operation in the previous year, the petitioner must submit a description of staffing, including the number of employees and the types of positions, *as well as evidence of the wages paid to the employees*. 8 C.F.R. § 214.2(l)(14)(ii)(D). (Emphasis added). The petitioner failed to provide any evidence of wages paid to the three employees and one contractor during the relevant period, yet continues to allege that the beneficiary operated in a supervisory capacity in the previous year. In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties.

In fact, counsel admits on appeal that "the documentation sent to [Citizenship and Immigration Services (CIS)] pursuant to is [sic] the Request for Additional Evidence clearly shows the employees were hired *after* the 2002 Income Tax Return was prepared." (Emphasis added). Obviously, this statement concedes that there were no subordinate employees working under the beneficiary during the initial one-year period previously granted by CIS. Counsel, therefore, is presenting a flawed argument as a basis for approval of the petition.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Counsel asserts that an undue hardship will fall on the petitioner should the extension request be denied, and cites the economic downturn after the September 11, 2001 tragedy as the reason for the U.S. entity's slow progress in the industry. This assertion, however, is not sufficient to overcome the regulatory requirement that the petitioner be eligible for the benefit sought at the time of the filing of the petition. In this case, counsel asserts that since the filing of the extension request, the U.S. entity has hired new employees and thus has solidified a supervisory position for the beneficiary. In addition, counsel alleges that additional employees will be hired in the coming months. These claims are not acceptable. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation only one year within the date of approval of the petition to support an executive or managerial position. (In this case, the one-year period expired on September 17, 2002). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

¹ The initial petition granted the beneficiary a one-year stay within the United States, from September 18, 2001 to September 17, 2002.

Beyond the decision of the director, the AAO notes some significant deficiencies in the record of proceeding that were not addressed by the director. First, the record does not contain sufficient evidence that establishes a qualifying relationship between the U.S. petitioner and the foreign entity. The record contains a copy of the foreign entity's Articles of Integration with an uncertified translation,² and copies of the U.S. entity's Articles of Incorporation and Minutes of Special Joint Meeting of Stockholders and Directors. There are no share certificates evidencing the issuance of the claimed amount of shares. Additionally, the U.S. entity claims that it issued 1000 shares to ██████████ in August of 2001, yet its Form 1040, U.S. Federal Tax Return for the year 2001 shows no capital contributions for that period. Without evidence of consideration for these shares, in addition to the additional deficiencies in the evidence, the petitioner has failed to substantiate the claim of a qualifying relationship between these entities. For this additional reason the petition may not be approved.

Finally, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. First, the petitioner submitted a lease agreement for the period from August 1, 2002 through August 1, 2003. Since the beneficiary's visa was granted on September 18, 2001, the AAO is skeptical with regard to the U.S. entity's business dealings and operations during this time period, for there is no explanation regarding the reason that it took ten and one-half months to secure a lease for a commercial premises. Additionally, the petitioner submitted a number of invoices and bank statements suggesting that it has been providing its claimed property management services on a regular basis. However, the documentation is sporadic and unclear. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is insufficient evidence that the petitioner was doing business during the one-year period. For this additional reason the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.

² Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.